No. 89-1905

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SUPREME COURT OF THE UNITED STATES

October Term, 1989

WISCONSIN PUBLIC INTERVENOR, and TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and
WISCONSIN FORESTRY/RIGHTS-OF-WAY/
TURF COALITION,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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STATEMENT OF THE CASE

Regulatory Background

Pesticide use is the subject of extensive federal regulation under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136, *et seq.* FIFRA requires that all pesticides be registered with the U.S. Environmental Protection Agency (EPA) and classified according to general or restricted use. (7 U.S.C. § 136a.) FIFRA also establishes a nationwide system for training and certifying pesticide applicators. (7 U.S.C. § 136b.) It is unlawful to use a pesticide which is not registered, to alter a pesticide, to use a pesticide contrary to label instructions or to engage in other acts prohibited by FIFRA. (7 U.S.C. § 136j.)

All of these requirements are enforced by EPA which has adopted extensive regulations governing

the sale and use of pesticides. 40 C.F.R. Subchapter E.

FIFRA specifies several roles for states. States which meet EPA standards may certify pesticide applicators under 7 U.S.C. § 136b. EPA may also enter into cooperative agreements with states to enable states to enforce FIFRA provisions. 7 U.S.C. §§ 136u and 136w-1. States may also regulate the sale and use of pesticides under 7 U.S.C. § 136v, except that states cannot permit what federal law prohibits.

In conformity with FIFRA, the Wisconsin Legislature has enacted extensive provisions regulating pesticides. Wis. Stat. §§ 94.67 - 94.71. These provisions are enforced by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) which has promulgated

administrative rules in Wis. Admin. Code Chs. Ag 29, Ag 161 and Ag 163.

The Town of Casey Ordinance

The Town of Casey is a rural town with a population of 404 persons, located in the northwest corner of Wisconsin.[1] In 1983, the Town of Casey, with the assistance of the Wisconsin Public Intervenor, set out to develop a comprehensive pesticide control ordinance. The ordinance at issue, Ordinance 85-1, requires that a person submit a detailed application with respect to any pesticide use to the town board of the Town of Casey (Town Board) **at least 60 days prior** to the proposed use. Ordinance, § 1.3(1).[2]

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[1]Data from 1980 Census reported in the Washburn County Directory 1982-83 compiled by John L. Brown, County Clerk.

[2]A copy of the Ordinance is contained in Petitioners' Appendix, Vol. I, App. C.

Among other things, § 1.3(2) requires that the following information must be submitted with any permit application:

> **(d) an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, known benefits and known risks associated with the chemical(s) to be used;**
>
> **(e) the chemical and non-chemical alternative methods or treatments available to accomplish the desired objectives and the reasons why the application of the proposed pesticide(s) is preferable to alternative chemicals and to other methods;**
>
> **(f) the status of the proposed pesticide(s) and of any chemical alternatives in the federal Environmental Protection Agency's (EPA) pesticide reregistration program ...**
>
> **(g) the positive and negative effect of reducing or eliminating the use of the proposed pesticide(s) and of any chemical alternatives;**
>
> **(h) the anticipated impact of the application upon humans, animals and plants of the proposed pesticide(s) and of any chemical alternatives;**

After an application is received, the Town Board has 15 days to make an initial determination on the application. The Town Board has discretion

to approve, condition or deny the request to use pesticides.

> (3) Initial Determination by Town Board. ... The board may impose any reasonable conditions on a permitted application related to the protection of the health, safety and welfare of the residents of the Town of Casey. ...
>
> Ordinance 85-1 § 1.3(3).

The applicant or any town resident may request a hearing before the Board on an initial determination, but the Town Board still retains the authority to approve, condition or deny the permit. § 1.3(5). Finally, a notice must be posted after any pesticide use. § 1.3(7).

Respondents brought a declaratory judgment action challenging the Town's Ordinance on the grounds that it was preempted by federal and state law. The Circuit Court for Washburn County, Wisconsin granted the relief requested and was upheld by the Wisconsin Supreme Court. *Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990).[3]

SUMMARY OF ARGUMENT

This case does not warrant review. The Wisconsin Supreme Court decision is consistent with the only federal circuit court decision on the issue. In addition, two other federal cases are presently pending before the Tenth and Sixth Circuits on the same issue. Thus, the alleged conflict is not significant nor ripe for review.

Moreover, the result of the Wisconsin Supreme Court was fair and correct. The court applied the proper legal standards in reaching its conclusion that

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[3]Respondent Ralph Mortier is an individual who was denied a license under the Town of Casey ordinance. Respondent, Wisconsin Forestry/Rights-of-Way/Turf Coalition is an unincorporated, non-profit association of individuals, businesses and other associations whose members use pesticides.

local law was preempted. This result precludes fragmented pesticide regulation by local units of government which are least able to address such complicated matters.

ARGUMENT

I. THE CONFLICT ALLEGED IN THE PETITION IS NOT SIGNIFICANT AND IS NOT RIPE FOR REVIEW.

A. The Alleged Conflict Is Not Significant.

The Wisconsin Supreme Court decision in *Mortier v. Town of Casey,* 154 Wis. 2d 18, 452 N.W.2d 555 (1990) holds that FIFRA preempts the local regulation of pesticides. This decision is in accordance with the only federal circuit court decision rendered to date, *Maryland Pest Control Association v. Montgomery County,* 646 F. Supp. 109 (D. Md. 1986) *aff'd*, 822 F.2d 55 (4th Cir. 1987). The Wisconsin Supreme Court decision is also in

accordance with the federal district court decision in *Professional Lawn Care Ass'n. v. Village of Milford,* Case No. 89-1439 (E.D. Mich., August 24, 1989); and the opinion of the court in *Long Island Pest Control Ass'n., Inc. v. Town of Huntington,* 72 Misc. 2d 1031, 341 N.Y.S. 2d 93 (1973).[4]

The Wisconsin Supreme Court is not in conflict with any federal circuit court opinions, and is consistent with the Fourth Circuit ruling. The only cases presenting an alleged conflict are decisions from the Supreme Courts of California and Maine and a decision from a federal district court in

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[4] In addition, the attorneys general from Maryland, 70 Op. Att'y Gen. 161 (Md. 1985); 73 Op. Att'y Gen. No. 88-006, (February 4, 1988); Oregon, 40 Op. Att'y Gen. 21 (Or. 1980); and Arkansas, Op. Att'y Gen. No. 89-212 (September 14, 1989) have reached the same result, as has the EPA, 40 Fed. Reg. 11697, 11700 (March 12, 1975).

Colorado.[5] A disagreement between state courts on a question of federal law should not warrant review in the absence of a conflict in the federal circuits.[6]

B. The Minor Conflict Which Exists Is Not Ripe For Judicial Consideration.

This Court has frequently noted that a conflict should be allowed to ripen before being given consideration by this Court. In *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950), Justice Frankfurter noted:

> **It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.**

[5] *People ex rel. Deukmejian v. County of Mendocino,* 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150 (1984); *Central Maine Power Company v. Town of Lebanon,* 571 A.2d 1189 (Me. 1990), and *COPARR, Ltd. v. City of Boulder,* 735 F. Supp. 363 (D. Colo. 1989).

[6] Moreover, within days of the California Supreme Court decision, the California Legislature enacted a special provision expressly overturning the California Supreme Court ruling by preempting local pesticide regulations at the state level. *See,* 1984 Cal. Laws Ch. 1386 § 3.

This same concern was also noted by Justice Stevens in denying the Petition for Certiorari in *McCray v. New York,* 461 U.S. 961, 962 (1983):

> **I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system.**

The admonition of Justice Stevens is particularly appropriate here. The only conflict in the federal system is between two federal district court opinions.[7] Both of these cases are presently on appeal to their respective circuits. Thus, within the next year, there will be two additional federal circuit court opinions on the issue presented by this case. If the decisions from the Tenth Circuit and Sixth

[7] *Professional Lawn Care Ass'n. v. Village of Milford,* Case No. 89-1439 (E.D. Mich. August 24, 1989) Pet. App. IIE and *COPARR, Ltd. v. City of Boulder,* 735 F. Supp 363 (D. Colo. 1989).

Circuit agree with the existing opinion from the Fourth Circuit and the Wisconsin Supreme Court, there will be no controversy for this Court to resolve. If these courts reach differing opinions, review can be considered at that time and in light of those decisions.

II. THE WISCONSIN SUPREME COURT CORRECTLY APPLIED WELL-SETTLED FEDERAL PREEMPTION PRINCIPLES.

Contrary to Petitioners' arguments, the Wisconsin Supreme Court reached its decision based upon well settled principles of preemption.

A. The Wisconsin Supreme Court Properly Used Legislative History.

The Wisconsin Supreme Court found that Congress preempted local regulation of pesticides based upon the statutory language of FIFRA as well as the legislative history. *Town of Casey,* 154 Wis. 2d at 24-31. As this court recently noted, "the question

whether a certain state action is preempted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). This Court has frequently utilized legislative history in determining whether there was Congressional intent to preempt state or federal laws. See, *e.g., Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230-233 (1947); *Campbell v. Hussey,* 368 U.S. 297 301-302 (1961); and *Florida Avocado Growers v. Paul,* 373 U.S. 132, 147-48 (1963).

Moreover, there are numerous cases where this Court has found legislative history to be the most significant if not the determinative factor in finding preemption. *Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634 (1973); *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 410 (1983). For example, in *Philko,*

this Court interpreted federal statutory language concerning the transfers of title to aircraft. Although the statutory language did not speak to preemption directly or indirectly, this Court concluded that federal preemption was "dictated by the legislative history." 462 U.S. at 410.

Thus, the Wisconsin Supreme Court's conclusion that the statutory language of FIFRA in conjunction with the legislative history preempted local regulation, is a methodology well supported by existing precedent.

B. The Wisconsin Supreme Court Properly Analyzed the Question of Local Preemption.

Petitioners claim that the analysis used by the Wisconsin Supreme Court was improper because it allowed for preemption of local regulations while

state regulations were allowed to continue. This concern is misplaced.

First, local laws do not require a special preemption analysis. This Court has unequivocally stated that, "for the purposes of the supremacy clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Second, there is nothing inappropriate or unusual about a Congressional scheme which preempts local regulation but leaves regulation at the state level intact. A situation very similar to the instant one was presented to the court in *Donelon v. New Orleans Terminal Company*, 474 F.2d 1108 (5th Cir. 1973). In that case, the Federal Railroad Safety Act provided for national railroad safety standards,

but allowed states to adopt additional or more stringent regulations. 45 U.S.C. § 434. The court held that while states could enact additional regulations, local governments were preempted from enacting such regulations. 474 F.2d at 1112.[8]

This is not an anomalous result. Clearly, Congress could have completely preempted the entire field of pesticide regulation and precluded any state role. Instead, Congress chose a scheme that is less intrusive on state rights. Under FIFRA, Congress provided for a continued state role in regulating pesticides and merely restricted local regulation. Such a scheme is consistent with the principles of

[8] A similar analysis was applied under the Federal Railroad Safety Act by the courts in *Consolidated Rail Corporation v. Smith*, 664 F. Supp. 1228 (N.D. Ind. 1987), and *Chesapeake and Ohio Railway v. City of Bridgman*, 669 F. Supp. 823 (W.D. Mich. 1987).

federalism and the Tenth Amendment with which Petitioners are concerned.

III. THE WISCONSIN SUPREME COURT REACHED A FAIR AND CORRECT RESULT.

A. The Court Properly Construed Legislative History.

Although the statutory language of FIFRA indicates an intent to preempt local regulation of pesticides, this intent is expressed with even greater clarity in the legislative history. The House Committee on Agriculture noted:

> The Committee [on Agriculture] rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 states and the federal government should provide an adequate number of regulatory jurisdictions.
>
> H.R. 511, 92nd Cong., 1st Sess. 16 (1971).

Similarly, the Senate Agriculture Committee stated:

> It is the intent that [7 U.S.C. § 136v] by not providing any authority to political subdivisions and other local authorities of or in the states, should be understood as depriving such local authorities and political subdivisions of any and

> all jurisdiction and authority over pesticides and the regulation of pesticides.
>
> 1972 U.S. CODE CONG. & ADMIN. NEWS 3993, 4008.

Petitioners assert that there was legislative silence on the issue because the above statements were not directly expressed in the statutory language. Petitioners also suggest that there was a Congressional compromise resulting in the absence of such language. These arguments must be rejected.

As noted above, the fact that Congressional intent to prohibit local regulation was not expressed in the statutory language does not mean that Congress was silent on the issue. Nor does it mean that such statements cannot be utilized to determine Congressional intent.

Moreover, nothing in the undisputed legislative history shows that there was a "compromise" on the

local regulation issue. Three times amendments were proposed that would have authorized such regulation. Each time such attempts were defeated.[9] The result is not a compromise between allowing or prohibiting local regulation. The result is that the minority which argued for the preservation of local regulation lost.

B. The Result of the Wisconsin Supreme Court Decision is Fair and Reasonable.

Petitioners argue in favor of local regulation of pesticides, based on the assertion that there are serious gaps and deficiencies in state and federal law. Their solution to this problem is to place the highly technical and complex questions of pesticide regulations into the hands of the nearly 2,000 units of local government in Wisconsin as well as the local

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[9] This legislative history is set forth in detail in *Town of Casey*, 154 Wis. 2d at 25-28.

units of government in other states. Doing so would merely fragment pesticide regulation. While this problem would be burdensome for farms spanning multiple jurisdictions, it would render pesticide application almost impossible for railroads and utilities which use pesticides to keep hundreds of miles of rights of way clear of encroaching vegetation.

Moreover, public policy would be ill served by giving pesticide regulation to the level of government least well equipped to handle highly complex and technical questions regarding pesticide application and use. The town boards of small rural towns such as the Town of Casey simply do not have the technical expertise necessary to regulate pesticides on a nonarbitrary basis. Such decisions are best left to the states and the federal government.

If there are problems with the existing pesticide laws, the solution is to improve those laws at the state and federal level, not fragment regulation by giving it to the units of government least well equipped to deal with these issues.

C. The Decision by the Wisconsin Supreme Court Does not Conflict With the Wellhead Protection Program of the Safe Drinking Water Act.

Finally, Petitioners raise a new issue not presented to the Wisconsin courts, by claiming that the preemption of local regulations presents a conflict with the federal Wellhead Protection Program of the Safe Drinking Water Act. The preemption of independent local pesticide regulations does not in any way interfere with the Wellhead Protection Program of the Safe Drinking Water Act. The Wellhead Protection Program placed primary responsibility for implementing wellhead protection

measures with the states. 42 U.S.C. § 300h-7(a)(1). It is up to the **states** to specify the duties of state agencies and local government entities. Local governments are not given unfettered rights to independently regulate pesticides or other substances entering wellhead areas. Any local program must be developed as a part of the state program.

Allowing local implementation of a state program is entirely different than the situation before the Wisconsin Supreme Court. The Town of Casey was not acting in accordance with or pursuant to a state program. To the contrary, it enacted its own independent set of regulations and an independent permitting program. To preclude the independent regulation of pesticides does not interfere with cooperative arrangements between states and local units of government with respect to the Wellhead Protection Program.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Dated this 3rd day of July, 1990.

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